but rather likelihood of confusion. (AP04849)[1]. It is also clear from the record that Home Depot contracted with Respondents to provide the products, hence there is no confusion of "other retailers" since other retailers were not presented with Respondents' products.

If Petitioner contends that Home Depots employees were "other retailers," (Pet. p. 2), the Court should note that the District Court did not refer to Home Depot employees as other retailers or address retailer confusion. Indeed, "retailer confusion" was not an issue presented to the jury as is made clear by the District Court's statement quoted above. (Pet. App. p. 24a). It is also clear that the Appellate Court understood that the evidence presented below was limited to the Home Depot and DFG employees. (Pet. App. 12a, first and second paragraphs).

The assertion at Pet. p. 2 last paragraph, that the Appellate opinion swept aside the distinction between functional features and non-functional trade dress is a misstatement. The District Court stated: "The heavy duty green stand with the red trim, in the open-top, cut-out white box trimmed in red and green has comprised DGI's trade dress...." (Pet. App. 16a, 18a, 22a). However, Mr. Boucher's testimony stated that DFG did not claim that any specific element constituted his trade dress instead it's a combination of the stand and the packaging overall from year to year. (AP04373). Moreover, Plaintiff specifically disclaimed elements from the "overall appearance" asserted as its trade dress, namely: holly design, specific cutouts, and red trim. (AP04373). In this regard, Mr. Boucher's

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[1] Unless specifically referring to the Reporter's Transcript of the trial, citations to "AP" refer to the Joint Appendix to the Briefs filed in the Federal Circuit on September 13, 2004. This citation refers to the Reporter's Transcript Vol. 5 May 12, 2003, p. 849.

testimony comparing DFG's stand and the accused products, highlights numerous differences in the stands and boxes. (AP04391-408).

Mr. Boucher's testimony shows that each of the accused stands and boxes incorporated different non-functional aspects while retaining only the functional elements which enabled the stands or packaging to work with the same utility as the DFG stand and its packaging. The Court of Appeals stated: "the copied elements of DFG's tree stand that were identified as being non-functional by the district court (i.e., the colors, the plastic rim, and the display box) were in fact utilitarian in nature." (Pet. App. p. 11a).

Thus, the Court of Appeals did not "sweep aside the distinction between functional features and non-functional trade dress."

A. The First Pipe Stand

Petitioner's statement on p. 5 that "the basic pipe stand design with nearly none of the aspects of the Composite Dress DFG would later develop," is clearly at odds with its own statements on Pet. p. 1, regarding the same precise dimensions, its emphasis at Pet. p. 8 that the stand in the test report was an "indistinguishable copy;" that Respondents' 1999 stand was "practically identical," (Pet. p. 9), and its recitation of the physical similarities of the stand noted by the district court, "the length of the legs, the height of the holder." (Pet. p. 13).

B. Development of DFG's Composite Dress

Again the assertion at Pet. p. 5, second paragraph, concerning a "custom shade of green" is a material misrepresentation of the truth. Mr. Boucher testified that he selected a "Christmas green" for his stand. (AP04141). Similarly, Mr. Boucher acknowledged the colors red and

green as traditional Christmas colors. (AP04303-04). By its misleading semantic reference to "custom color," Petitioner seeks to appropriate traditional Christmas colors for a Christmas tree stand. However, the evidence shows Plaintiff's definition of "custom color" is simply a color blended by DFG's supplier to match the stock O'Brien "EVERGREEN" DFG used in 1995. (AP04369).

DFG originally selected traditional Christmas green and red for the stand. (AP04305). DFG's original paint supplier, Royal Tone, prepared a dark green Christmas color. (AP04141). In 1995, DFG switched suppliers to O'Brien who had a stock "EVERGREEN," which was indistinguishable from the Royal Tone green. (AP04141-42). After successfully underbidding O'Brien, Tiger DryLac became the supplier and simply matched O'Brien's "EVERGREEN," a stock color still offered by DuPont. (AP04141-44; AP04366-69; AP04921-23). Thus, the uncontradicted evidence shows DFG uses a standard Christmas "EVERGREEN" as matched by their supplier. Plaintiff produced no evidence of any care in selection of a specific shade of red.

The box and stand shown in Pet. App. 74a is the 1998 box and stand rather than the 1993 box and stand. The box pictured in Pet. App. 74a reflects disclaimed subject matter including the holly design and the red trim. (AP04372-73).

Strikingly absent from Petitioner's assertions regarding the elements it now dubs as its "composite dress" is an averment or evidentiary support indicating that any element was selected for or otherwise serves as an indicator of source. (Pet. pp. 5-6).

C. Decorations for Generations' Business

Here again, the assertion at Pet. p. 6, paragraph 2 regarding the purported "reputation" of Decorations is

unsupported by any evidence of consumer perception concerning the source of the stands. The alleged satisfaction with the heavy duty ¼ inch steel tree stands as a product goes to the nature of the product the consumer wanted. It says nothing concerning the reputation of Petitioner as a source of the product that consumers would look to for a product of the same quality, since there was no testimony from consumers on such satisfaction. Moreover, the testimony Petitioner cites regarding the quality of its products relates only an absence of consumer complaints, and thus an absence of perception by consumers regarding their product, rather than Petitioner's inaccurate and undocumented assertion that its product "received only praise from customers." (Pet. p. 6. (AP04753-54; AP04772-75)).

The Boucher's' beliefs as to the best advertisement for Petitioner's stand is irrelevant. Similarly, Petitioner fails to note that in all of the catalog and advertising flyers of the Petitioner's stand by retailers of record in the case, there was: 1) no mention of Petitioner as the source of the product, 2) no use of the packaging in any of the advertising; and 3) all of the advertising touted the utilitarian aspects of the tree stand. (AP04273-81; AP04307-10). The unsolicited statement from the Today show: "Get the heft of this one. It's in the right colors," clearly indicates that it was incapable of distinguishing Petitioner as the source of the goods. (AP06305).

Petitioner's citation to its advertising expenditures and efforts directed to retailers is irrelevant to establishing secondary meaning in this case in as much as Petitioner failed to establish that retailers were members of the relevant buying class for the product which was clearly a consumer product. The evidence of record unmistakably shows that Respondents' products were never offered to retailers, only end users. The evidence shows Petitioner did nothing to create secondary meaning among consumers.

Even if Petitioner's advertising is considered, it is incapable of establishing secondary meaning in Petitioner's "composite trade dress" because none of the advertising featured the stand with the box. Moreover, as is clearly evident from all of Petitioner's advertising to its retailers, the advertising touts the functional attributes of the stands the antithesis of that required to establish secondary meaning.

D. The Market for Alternative Pipe Stands

Petitioner's contentions at Pet. p. 7 regarding the market for alternative stands is only relevant to the issue of secondary meaning on the factor of exclusivity of use. (Pet. App. p. 9a). Petitioner attempts to discredit the impact of the Lewis stand because of insignificant sales. However, Petitioner presented no sales data to support the viability of the other alternative stands in the market place that would permit their consideration in the secondary meaning inquiry.

While Petitioner properly notes that the Bowling stand was red, Petitioner deliberately avoids pointing out for the Court that the Lakewood stand has a shade of green that is indistinguishable from Petitioner's stand and that it too has the same protective leg tips as Petitioner's stand and that the tips are in the same contrasting red as those of Petitioner's stands. (Pet. App. p. 75a).

Similarly, Petitioner's citation to Mr. Boucher's attempts to downplay the functional superiority of Petitioner's stand over its competitors is irrelevant to the secondary meaning or functionality inquiries.

The attorney arguments advanced for the first time on this Petition for Certiorari found at Pet. p. 8 n.1, concerning the inferences that could have conceivably been derived from the evidence regarding the Lewis stand were never presented to the jury nor at any point in the post–trial or appellate stages of this case.

If it is Petitioner's contention at this late stage of the case that Petitioner's asserted "composite dress" is a 7" green heavy duty stand, having a contrasting red plastic ring, and displayed in a white, open-topped notched display box, (Pet. pp. 5-6), there exists no basis for distinguishing the Lewis stand as it shares exactly the same elements of the "composite dress."

E. Respondents' Pipe Stand

Petitioner's continued disparagement of the quality of Respondents products, (Pet. p. 9), fails to note that Home Depot's inspection procedures fol.owed the American National Standards Institute (ANSI) standard, or that the levels of defects permitted under such standards are determined by the nature of the product. (AP04743-45). Moreover, the purported defects in Respondents' products have no bearing on whether Petitioner had established secondary meaning in its own products in the first instance.

According to the testimony of Jim Shinegaka, Home Depot originally purchased Petitioner's stand for its functional characteristics and advised Petitioner on the construction of the box that Petitioner claims as its trade dress for its utilitarian purpose in displaying the stand. (AP04751-58). Petitioner never presented any evidence that Home Depot's original motivation for selling Petitioner's stand and box for their functional characteristics ever changed.

Indeed, the same is clear from the testimony of Home Depot's West Cost Buyer in response to Petitioner's questioning on direct examination:

> "Q. When you first saw the Mutual Allied stand at the meeting in December of 1999, you thought it looked similar to the Decorations for Generations stand, didn't you, sir?

A. Functionally did the same thing.
Q. Well, sir, apart from it serving the same function, you also thought it looked similar, it's physical appearance was similar, right, sir?
A. Physical appearance and the functionality. It did the same thing, yes."
Q. All right. That may be your opinion, but at your deposition you testified that it served the same function and it also looked similar, right, sir?
A. Correct.
Q. You recall thinking at the time that the stand you were being shown looked similar to the Decorations for Generations stand, right, sir?
A. Correct.
Q. Even though you recall thinking that, you didn't say anything at that time, did you, sir?
A. No, not that I remember.
Q. Sir, the reason why you didn't say anything is because you were relying on Atlanta to do their job, right?
A. That's their function, yes.
Q. Sir, I'm just going to briefly read a portion from your deposition at 127, lines 4 to 19:
"QUESTION: When you say relying on Atlanta to do their job, what do you mean?
"ANSWER: They would, I would hope, be concerned about any type of infringement if there was any.

(AP04793-95)[2].

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[2] Petitioner's subsequent mischaracterization of this testimony as "powerful evidence that the stand's appearance was so strongly associated with DFG that copying it seemed

F. Retailer Source Confusion

The assertion at Pet. p. 10 regarding alleged confusion of "Home Depot employees" is not supported by the record as evidence of secondary meaning. The Home Depot buyer testified that he noted that the Respondents' stand was functionally and visually similar to Petitioner's stand, but at no point did he testify that he was confused. (AP04793-95). As noted at Pet. p. 10 at F., second paragraph, Petitioner's CFO "assumed" there was confusion because an unidentified "manager" distinguished between two stands he had on hand that "look a lot alike." In addition to its hearsay character, there was no evidence in the record that either of the stands referred to by the "manager" was Respondent's stand, or even Petitioner's stand for that matter. The second instance recited clearly states that the basis for an unidentified lot attendant's belief that the products came from the same company was his identification of Home Depot's SKU rather than the appearance of the products at issue.

There were no retail witnesses called who testified that they were confused, rather the witnesses referenced by Petitioner as "industry professionals" were Petitioner's own outside sales representative and inside salesman. (Pet. p. 10, first paragraph). Moreover, contrary to its representations before this Court, Petitioner represented to the District Court that these witnesses were not presented "as evidence of actual consumer confusion." (AP04849 – Reporter's Transcript Reporter's Transcript n.1 *supra*). Rather, "We're presenting it as evidence probative of the likelihood of consumer confusion, which is, of course, the ultimate issue." (*Id.*). Thus, by Petitioner's own representations, this testimony is irrelevant to the issue of secondary meaning, which

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like a trespass," (Pet. p. 29), simply cannot be supported by this testimony.

according to the factors considered by the Ninth Circuit in establishing secondary meaning only references *evidence of actual confusion*. (Pet. App. 9a, para D. (6); Pet. App. 21a (citing Jury Instr. No. 16)).

G. Trial and Jury Instructions

Contrary to Petitioner's representations concerning the design patent infringement claim, (Pet. p. 11), the district court granted summary judgment for non-infringement rather than on functionality. The district court construed the Petitioner's design patent "as narrowly protecting the illustrated leg configuration with the stand's legs extending diagonally from the corners of a square base plate at 90 degree angles in a cross shape, the single novel, non-functional feature disclosed in the patent." (Pet. App. p. 65a). The district court then granted summary judgment of non-infringement for Respondents because Petitioner "had not established that Respondents had copied the protected leg configuration." (Pet. App. 66a). The district court also held that Petitioner "had presented no evidence that that Respondents had manufactured, imported or sold any tree stands with the design of the first MAL stand" [the stand shown in Pet. App. 78a]. The district court's finding of non-infringement on the design patent was not appealed. (Pet. App. p. 3a n.2). The Respondents were precluded from informing the jury of their success on the design patent infringement claim.

Before the district court and at the Federal Circuit, Petitioner relied only on the "overall appearance of its stand and packaging" as its asserted trade dress, leaving Respondents, the district court, the court of appeals and the jury to guess as to what elements comprised Petitioner's trade dress. Despite the fact that the Ninth Circuit model jury instructions and Respondents' requested jury instructions contemplated that Petitioner articulate its trade dress, as indicated by the bracketed text: "[*describe plaintiff's trade*

dress]" in each of the instructions, the district court refused to require Petitioner to do so. Instead the district court substituted the amorphous term "protectable trade dress" throughout the jury instructions. Similarly, the district court refused to instruct the jury on Respondents' requested jury instruction No. 2, which set forth this Court's guidance on the legitimate purposes of copying as set forth in *TrafFix*. (AP03008-10). Moreover, in dismissing Respondents' arguments regarding the omitted instruction the district court characterized this Court's guidance from *TrafFix* as argumentative. (Pet. App. 24a).

H. The District Court's Decision

The district court focused on the "copying" by Respondents as overriding all other factors which should be considered in the secondary meaning analysis and thereby improperly reduced the entire secondary meaning inquiry into whether Respondents intentionally copied the competitive product.

I. The Federal Circuit's Decision

The Federal Circuit correctly found that secondary meaning had not been established.

III. ARGUMENTS FOR DENYING CERTIORARI

In this Court, Petitioners have attempted to characterize this dispute as a policy matter, emphasizing the global nature of commerce and the source of Respondents' product. In fact, the officers and shareholders of respondent International Business Corporation, itself a family owned business, are American citizens of Chinese descent (AP04547; AP05038-41), who have family and contacts in China and Taiwan, including the owners of Respondent Mutual Allied, which enable them to source products in China for American and Canadian markets. When an

American businessman lawfully utilizes his contacts in a Global marketplace to obtain goods at a lower price, his conduct should not be judged on the origin of the goods nor the color of his skin nor his ethnic background, and the innuendo implicit in Petitioner's argument before this Court and the District Court is uncalled for.

Here and below, Petitioner implied that because the Respondent's product was made in China that it was of poor quality (AP04226-27), and used Home Depot's Quality Assurance inspection reports to unfairly characterize the "imported" products as inferior, despite the fact that Petitioner had no formal Quality Assurance program. (Pet. p. 9; AP04120-22; AP04410). These tactics were intended to elicit an emotional response from the jury and they succeeded. The purpose of the post trial motions made by Respondents is to give the court the opportunity to prevent such underhanded tactics from obscuring the legal rights of the parties. The Court of Appeals properly disregarded the biases inherent in Petitioner's arguments and looked at the evidence presented to reach its conclusion that that Plaintiff's evidence of secondary meaning was insufficient to support the jury's impassioned verdict.

Further, Petitioner brings to the Court an unpublished, unanimous decision by the Federal Circuit which has been reconsidered en banc, and asserts that this unpublished decision creates a controversy which merits Supreme Court review. As shown hereinafter there is nothing in the decision which merits such review.

A. The Court Of Appeals Did Not Rely On Functionality To Decide This Case, And The Existence And Role Of Functionality Has Already Been Decided In This Court.

The Federal Circuit's decision made no mention of nor did it rely on "Aesthetic Functionality" to reach its

decision. Its decision was based on the issue of secondary meaning. (Pet. App. pp. 8a and 13a). Moreover, the ruling of the Federal Circuit was entirely consistent with the law of the various Circuits and this Court. The state of the law in the Ninth Circuit is properly set forth in *Stephen W. Boney, Inc. v. Boney Services, Inc.*, 127 F.3d 821, 825 (9th Cir. 1997) which was quoted in *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1262 (9th Cir. 2001), wherein the Ninth Circuit noted, "'[T]he elements making up the alleged trade dress must have been used in such a manner as to denote product source. Thus, a product feature whose only impact is decorative and aesthetic, with no source-identifying role, cannot be given exclusive rights under trade dress law.'" (quoting 1 J. THOMAS MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8:1 (4th ed. 2005)).

Petitioners parsed quotation from *Clicks Billiards* at Pet. App. p. 20, that "trade dress cannot be both 'functional and purely aesthetic,'" not only ignores the court's immediately preceding statement that "[t]rade dress, of course, can be aesthetically pleasing and still play a source-identifying role; it can also be both aesthetically pleasing and functional." *Clicks Billiards*, 251 F.3d at 1260. Moreover, it entirely misses the point that elements of the trade dress can be incapable of providing source identification due to their purely aesthetic or decorative nature. *Stephen W. Boney*, 127 F.3d at 828. Hence, Petitioner's admitted use of Christmas colors could not have been given any weight in the secondary meaning analysis without proof of a source identifying role. As noted above, the colors were chosen because they were Christmas colors and the protective ring was added to give the product "a finished look" rather than to indicate source. (AP04646-47). Likewise, the white open topped cut-out box which was admittedly designed to allow the consumer to inspect the functional stand and was never shown to serve a source identifying role.

The same theme pervades the cases cited by the Petitioner, "does the feature which the claimant asserts as its trade dress serve to identify a source of the product or merely serve as ornamentation or decoration." Thus, Petitioner's argument is truly a matter of semantics and labeling, attempting to use the term "aesthetic functionality" to create an issue for appellate review where none exists. This Court has amply addressed these issues in *TrafFix*, *Wal-Mart Stores, Inc. v. Samara Bros, Inc.*, 529 U.S. 205 (2000); *Qualitex*, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) and *Dastar* among others. The Appellate Court was correct in finding that the Christmas colors and open topped white box could not serve as source indicators and that Plaintiff failed to present sufficient evidence that the combination of features claimed by Petitioner had acquired secondary meaning.

The requirement that the feature(s) have a source identifying role is universally applied by the Circuit Courts of Appeal, particularly since this Court's decision in *TrafFix*. Indeed the pre-*TrafFix* decisions cited by Petitioner to fabricate a conflict over the doctrine of "aesthetic functionality" apply this same standard. *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1006 (2d Cir. 1995) (denying trade dress protection because the designs reflected no relationship to the source).

The Third Circuit took the same position in *Duraco Products, Inc. v. Joy Plastic Enterprises, Ltd.*, 40 F.3d 1431, 1442 n.9 (3d Cir. 1994), stating: "Although various forms of the inquiry have been articulated, the essence of the question is whether a particular feature of a product is substantially related to its value as a product or service, i.e., if the feature is a part of the 'function' served, or whether the primary value of a particular feature is the identification of the provider." (emphasis omitted). Since this Court's decision in *TrafFix*, the Third Circuit again stated, "trade dress protection extends only to incidental, arbitrary or ornamental

product features which identify the product's source." *Shire U.S., Inc. v. Barr Labs., Inc.*, 329 F.3d 348, 353 (3d Cir. 2003) (citing *Eppendorf-Netherer-Hinz GmbH v. Ritter GmbH*, 289 F.3d 351, 355 (5th Cir. 2002)).

Contrary to the Petitioner's representation to the Court, the Fifth Circuit has expressly declined to decide the viability of the doctrine of aesthetic functionality. *See Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 540 n.6 (5th Cir. 1998) ("Without deciding the viability of aesthetic functionality in this circuit. ... the golf-hole designs at issue are not aesthetically functional.").

Petitioner's reliance on pre-*TrafFix* decisions of the Courts of Appeal to fabricate a conflict under the moniker of "aesthetic functionality" is misplaced, as reflected in the decisions of the Courts of Appeal that have addressed the issue of functionality since the Court's decision. These cases were not decided on "aesthetic functionality" grounds, rather each was decided within the framework of the Court's functionality analysis expressed in *TrafFix*. *See Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 116 (2d Cir. 2001) (articulating *TrafFix* functionality formulations, specifically deciding that asserted "overall look" of product line incapable of receiving trade dress protection without articulation of elements of trade dress, i.e. unable to apply the tests without knowing what to apply the test to); *Shire U.S.*, 329 F.3d at 353; *Eppendorf-Netherer-Hinz GmbH*, 289 F.3d at 355 (*TrafFix* supersedes the definition of functionality previously adopted by this court. The "utilitarian" test, although still valid as a secondary test, is not a comprehensive definition of functionality.); *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 641 (6th Cir. 2002) (applying *Qualitex* "significant non-reputation-related-disadvantage" test to find products functional); *Antioch Co. v. Western Trimming Corp.*, 347 F.3d 150, 155 (6th Cir. 2003) (holding scrapbook functional under traditional *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456

U.S. 844 (1982) test); *Eco Mfg., LLC v. Honeywell Int'l, Inc.*, 357 F.3d 649, 654-55 (7th Cir. 2003) (Noting "*TrafFix* rejected an equation of functionality with necessity; it is enough that the design be useful. ... feature is functional if it is essential to the design *or* it affects the article's price or quality"); *Frosty Treats, Inc. v. Sony Computer Entm't Am., Inc.*, No. 04-2502, -- F.3d --, 2005 WL 1981285, at *4 (8th Cir. July 25, 2005) (reversing district court's understanding of "functionality" in its colloquial sense rather than its specialized trademark meaning and articulating both tests from *TrafFix*); *Talking Rain Beverage Co. v. South Beach Beverage Co.*, 349 F.3d 601, 603 (9th Cir. 2003) (finding drink bottles functional under traditional *Inwood* test); *Dippin' Dots, Inc. v. Frosty Bites Distribution*, 369 F.3d 1197, 1203-04 (11th Cir. 2004) (finding color, size and shape of flash-frozen ice cream functional under traditional test of functionality); *Valu Eng'g v. Rexnard Corp.*, 278 F.3d 1268, 1276 n.4 (Fed. Cir. 2002) ("We need not decide what role, if any, the determination of a 'significant non-reputation-related disadvantage' plays in aesthetic functionality cases, because aesthetic functionality is not at issue here."). It appears that the First and Fourth Circuits have not addressed the issue of functionality since *TrafFix*, and the Tenth Circuit has not revisited the issue of functionality since its decision in *Vornado Air Circulation Systems, Inc. v. Duracraft Corp.*, 58 F.3d 1498 (10th Cir. 1995), which this Court criticized as overly narrow in .

Based on the foregoing, there is no indication that the Courts of Appeal have strayed from the Court's guidance, nor is a conflict presented among the Circuits, particularly with respect to the issue of "aesthetic functionality."

B. The Issue Of Copying In The Secondary Meaning Context Has Been Settled In This Court.

Petitioner ignores the holding of the Circuit Court in presenting its question on copying. The Federal Circuit, while acknowledging "copying" of the utilitarian features of the product, held that Petitioner had presented no evidence that Respondents had copied protected trade dress that had been perceived by consumers as originating from a particular manufacturer. (Pet. App. A 11a-12a). In making its argument, Petitioner completely ignores this Court's admonition:

> The right to copy, and to copy without attribution, once a copyright has expired, like "the right to make [an article whose patent has expired]—including the right to make it in precisely the shape it carried when patented—passes to the public." *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964); *see also Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 121–122 (1938). "In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying." *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001) . The rights of a patentee or copyright holder are part of a "carefully crafted bargain," *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–151 (1989), under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution. Thus, in construing the Lanham Act, we have been "careful to caution against

> misuse or over-extension" of trademark and related protections into areas traditionally occupied by patent or copyright. ... "The Lanham Act," we have said, "does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of exclusivity." Id., at 34. Federal trademark law "has no necessary relation to invention or discovery," *Trade-Mark Cases*, 100 U.S. 82, 94 (1879), but rather, by preventing competitors from copying "a source-identifying mark," "reduce[s] the customer's costs of shopping and making purchasing decisions," and "helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product." *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–164 (1995) .

Dastar Corp, 539 U.S. at 33-34.

In citing the Ninth Circuit precedent in *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 615 (9th Cir. 1989), Petitioner fails to note that the copying which the Ninth Circuit finds probative of secondary meaning has its origins in the Ninth Circuit decision in *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1016 (9th Cir. 1985), which states: "Proof of *exact* copying, without any opposing proof, can be sufficient to establish a secondary meaning." (*emphasis added*) (jury verdict sustained where Defendant copied "Shift Kit" name, "SK" product designation, and filled orders for customer's requesting Plaintiff's product). Petitioner's omission regarding the requirement for *exact* copying is also evident in its parsed citation to *Larsen v. Terk Techs. Corp.*, 151 F.3d 140, 148

(4th Cir. 1998), which requires both *direct* and *intentional* copying (finding direct copying of each detail including "CD25" and TOMMY LARSEN names, Larsen's logo, and designated "Design of Denmark" and "Made in Denmark" despite their being made in New York).

The uncontradicted evidence below as set out in the testimony of Jim Boucher, Petitioner's CEO, revealed numerous differences in the products. Further, it is undisputed that Respondents intentionally made changes to their products to avoid any rights they believed Petitioner had, such as design patent rights. Hence, Petitioners invocation of the Ninth Circuit "rule" is inapplicable to this case.

Moreover, Petitioner ignores current precedent from the circuit to the contrary: "there is nothing inherently wrong with [a competitor's] interest in copying the [asserted] configuration: The requirement of non-functionality is based on the judicial theory that there exists a fundamental right to compete through imitation of a competitor's product, which right can only be temporarily denied by the patent or copyright laws." *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 785 (9th Cir. 2002) (internal quotations omitted); and the Ninth Circuit's explanation of the relevance of copying in *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 845 (9th Cir. 1987), on which the district court refused to instruct the jury.

The *Fuddruckers* explanation makes it clear that intentional copying of unprotected trade dress is not probative of secondary meaning in the Ninth Circuit: "Competitors may intentionally copy product features for a variety of reasons. They may, for example, choose to copy wholly functional features that they perceive as lacking any secondary meaning because of those features' intrinsic economic benefits." *Id.* at 844-45.

Contrary to Petitioner's representations to the Court at (Pet. p. 26), the Ninth Circuit's rule is precisely the same as that articulated by the Third Circuit, "[A]ttempts to copy a product configuration will quite often not be probative [regarding secondary meaning]: the copier may very well be exploiting a particularly desirable feature, rather than seeking to confuse consumers as to the source of the product." *Duraco Prods.*, 40 F.3d at 1453; *Fuddruckers*, 826 F.2d at 845.

Indeed, the opinions of this Court in the cases cited above have adequately disposed of the distinctions between the Circuits as to whether copying of functional or non-source identifying features of trade dress is lawful. Clearly such copying is lawful and cannot serve as the basis for a finding of secondary meaning.

C. There Is No Evidence Of Retailer Confusion In This Case And Retailers Are Not Part Of The Class Of Purchasers Relevant To Secondary Meaning In This Case.

As noted in Respondents' objection to the Statement by Petitioner, the question presented regarding "retailer confusion" is merely hypothetical in this case. There is no evidence in the record relating to retailer confusion or consumer confusion. Hence there is no basis for the argument that actual retailer confusion can supplant the factor of actual consumer confusion in the secondary meaning analysis.

Thus, Petitioner asks the Court to decide a hypothetical issue based on its assertions of their salesmen, without any evidence that their salesmen's perception of the Petitioner's stand would be the same as that of consumers.

Petitioner's attempt in this Court to recast its own sales representatives as "retailers" to cloak their testimony in

the shroud of relevancy in the secondary meaning inquiry is without merit. In the first instance, contrary to its representations before this Court, Petitioner represented to the district court that these witnesses were not presented "as evidence of actual consumer confusion." (AP04849 – Reporter's Transcript n.1 *supra*). Rather, according to Petitioner, "We're presenting it as evidence probative of the likelihood of consumer confusion, which is, of course, the ultimate issue." (*Id.*). More importantly, long standing Ninth Circuit authority on the lack of relevance in this testimony is clear and unequivocal:

> "Trademark law is skeptical of the ability of an associate of a trademark holder to transcend personal biases to give an impartial account of the value of the holder's mark. "'Attestations from person in close association and intimate contact with (the trademark claimant's) business do not reflect the views of the purchasing public.'" *Norm Thompson Outfitters, Inc. v. General Motors Corp.*, 448 F.2d 1293, 1297 (9th Cir. 1971) (quoting *88¢ Stores, Inc. v. Martinez*, 227 Or. 147, 216 P.2d 809, 814 (1961)).

Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 910 (9th Cir. 1995). Indeed, Petitioner's counsel and the district court recognized as much. (AP04849 - Reporter's Transcript n.1 *supra*).

Similarly, as stated *supra* pp. 11-12, Petitioner's uncorroborated recounting of alleged statements by Co-Respondent's employees by Petitioner's officers, do not support the assumption of those officers that said employees

were confused.[3] These allegations cannot be substituted for the total lack of evidence of consumer confusion.

Even if these anecdotal comments were evidence of "retailer" confusion, the law in the Ninth Circuit precludes reliance on such information as evidence of actual consumer confusion in support of establishing secondary meaning. In the Ninth Circuit and applied in the other courts of appeal, secondary meaning requires showing that there is "'a mental recognition in buyers' and potential buyers' minds that products connected with the [mark] are associated with the same source.'" *Self-Realization Fellowship Church*, 59 F.3d at 911 (quoting *Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d 817, 820 (9th Cir. 1980)). The question of non-consumer testimony was addressed by the Ninth Circuit in *Japan Telecom* wherein the court stated:

> Although all the declarants claim to have the sort of mental recognition that's characteristic of secondary meaning, [Plaintiff] has not come forward with evidence that they formed this recognition for any reason other than their personal relationships with [Plaintiff] or its president. Consequently, their declarations are not persuasive evidence that a significant number of consumers have formed a similar mental association. Had they formed their mental association with [the mark] because of some stimulus that was just as likely to affect

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[3] This is true regardless of the clear hearsay nature of the statements recounted by Petitioner's CFO. *Japan Telecom, Inc. v. Japan Telecom Am., Inc.*, 287 F.3d 866, 874 n.1 (9th Cir. 2002) ("We give no weight to the declarants' statements that they knew of others who were confused by the similarity of the two marks, because these statements lack foundation and constitute hearsay.").

> members of the buying public as it was likely to affect them (such as advertising), their declarations would have been more persuasive.

Japan Telecom, 287 F.3d at 874.

Petitioner cites to cases in other Circuits wherein "retailer" confusion was sometimes useful to show a likelihood of consumer confusion in the infringement analysis, however, the likelihood of confusion analysis and the secondary meaning analysis are two separate inquires and are treated as such even in the cases cited by Petitioner. Moreover, each of those cases are readily distinguished on the facts and their specific holdings show Petitioners arguments to be meritless.

For example, unlike the situation in this case where Respondent does not offer its product to other retailers, plaintiff's and defendant's representatives in *Fuji*, both attended a particular trade show to present their goods and services. *Fuji Photo Film Co. v. Shinohara Shoji Kabushiki Kaisha*, 754 F.2d 591, 593 (5th Cir. 1985). The court notes that Fuji first became aware of Shinohara's use of the *Fuji* mark when its representatives attending that trade show thought *Fuji* had reneged on its exclusive distribution agreement with them. *Id.* The court found actual confusion where "Visitors to the show also inquired as to the connection between the two 'FUJIs.'" *Id.*

Likewise, *Carnival Brand Seafood Co. v. Carnival Brands, Inc.*, 187 F.3d 1307 (11th Cir. 1999), was decided in the likelihood of confusion context on the factor relating to the identity of purchasers and similarity of retail outlets. As the court clearly states: "The test of course is whether one — in this case a retailer — who had seen [plaintiff's] product under the mark [in question], would later know the difference when presented with an identical [product] offered to him

under the [confusingly similar mark]." *Carnival Brand*, 187 F.3d at 1314. In this context, the Eleventh Circuit stated:

> It would be unlikely for any confusion of source or sponsorship to arise at the level of the end user, since the end user would never see the CARNIVAL mark used in connection with Mariscos' high-quality raw shrimp. Rather, any possible confusion could arise only at the level of the retailers or wholesalers who purchased Mariscos' shrimp in boxes bearing the name CARNIVAL, and also were in the market for CBI's products.

Id. at 1313.

Thus, in the relevant market described in *Carnival*, confusion of "retailers" was relevant to the likelihood of confusion analysis, whereas confusion of the consumer end user was not. Moreover, even if the testimony of Home Depot's West Coast Buyer is considered, he clearly distinguished between Petitioner's product, and Respondent's product. *Supra* pp. 10-11.

As Petitioner's correctly cites Professor McCarthy, "*if* the relevant buyer class consists of both retailers and ultimate consumers, then the state of mind of the dealers is obviously important. 2 J. THOMAS MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:46 (4th ed. 2005) (emphasis added and emphasis omitted). However, as Petitioner's cited cases demonstrate it has not satisfied the conditional requirement of establishing the relevant buying class. The facts of this case unmistakably show that Respondents' products were not offered to other retailers. Respondents' products were only offered to Co-Respondent, Home Depot. Accordingly, the relevant buying class is the end user of the subject stands, the consumer. Therefore, "retailer" confusion

cannot be considered in assessing the factor of actual consumer confusion in the secondary meaning analysis.

Beyond the fact that Petitioner's third question presents only a hypothetical question, Petitioner expressly acknowledges, there is no conflict among the circuits on this issue. (Pet. p. 29). A "circuit split in the making" can hardly constitute a present conflict. Accordingly, appellate review in this Court is clearly unwarranted.

D. Petitioners Extraneous Assertions Which Are Unrelated To Secondary Meaning Have No Bearing On Deciding The Petition.

As the Federal Circuit properly found, Petitioner failed to present evidence sufficient to support a necessary element in their case, namely the existence of secondary meaning. In this Court, the court of appeals, and in the district court, they have attempted to raise prejudicial allegations unrelated to the issue of secondary meaning, functionality, or likelihood of confusion. These allegations should be disregarded in the Court's consideration of whether to grant certiorari.

Specifically, with regard to the Federal Circuit's decision on secondary meaning, Petitioner raises as an issue the quality of Respondents products. Even if the allegations of poor quality made by Petitioner were true, they would have no bearing on whether there exists "a mental recognition in buyers' and potential buyers' minds that products connected with the Petitioner's asserted trade dress] are associated with the same source."

Likewise, Home Depot's choice of what SKU number to use on products it sources for its stores has no bearing on whether secondary meaning in the alleged trade dress had at that point been developed.

CONCLUSION

As set forth in the foregoing, Petitioner has not demonstrated that the unpublished decision of the Court of Appeals for the Federal Circuit is in conflict with the decision of another United States court of appeals on the issue of secondary meaning in an unregistered product configuration trade dress under Section 43(a) of the Lanham Act so as to call for an exercise of this Court's supervisory power. Moreover, the decision of the Federal Circuit, does not present an important question of federal law that has not been, but should be, settled by this Court. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 05-310

IN THE

Supreme Court of the United States

DECORATIONS FOR GENERATIONS, INC.,
Petitioner,

v.

HOME DEPOT USA, INC.,

and

INTERNATIONAL BUSINESS CORPORATION and MUTUAL ALLIED, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENT HOME DEPOT USA, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Circuit properly concluded that on the facts of this case there was insufficient evidence to support a funding that the claimed "trade dress" of the petitioner, namely, a green-and-red Christmas tree stand in an open white box, had acquired "secondary meaning" as an indication of source in the minds of consumers.

RULE 29.6 STATEMENT

Home Depot USA, Inc. is a wholly owned subsidiary of Home Depot International, Inc. which, in turn, is a wholly owned subsidiary of The Home Depot, Inc., which is a publicly traded corporation. No publicly held corporation owns 10% or more of the stock of The Home Depot, Inc.

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DECORATIONS FOR GENERATIONS, INC.,
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INTERNATIONAL BUSINESS CORPORATION and
MUTUAL ALLIED, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENT HOME DEPOT USA, INC. IN OPPOSITION

OPINIONS BELOW

The unanimous decision of the Federal Circuit (Pet. App. 1a-13a) is not published. The decisions of the district court (Pet. App. 14a-48a and 49a-71a) are not reported. The Federal Circuit denied panel and en banc rehearing. Pet. App. 72a-73a.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2005. Pet. App. 1a. The petition for rehearing was denied on June 3, 2005. Pet. App. 73a. On August 26, 2005, the late Chief Justice extended the time for filing a petition for a writ of certiorari until September 3, 2005 (a Saturday). The petition was filed on September 6, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(l).

STATEMENT

Petitioner Decorations for Generations, Inc. (hereafter "DFG") sued respondents, Home Depot USA, Inc. (hereafter "Home Depot"), International Business Corporation and Mutual Allied, Ltd., alleging design patent infringement and trade dress infringement based on a Christmas tree stand made for Home Depot by the other respondents. DFG claims that the respondents intentionally copied DFG's stand and the open-topped box in which it was sold. The district court granted summary judgment of no design patent infringement. Pet. App. 71a.

As the court of appeals explained (Pet. App. 6a-8a), there are three requirements for establishing a trade dress infringement claim. The first requirement is that "the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional." 15 U.S.C. § 1125(a)(3). The second requirement is that the asserted trade dress must have acquired secondary meaning. Thus, in this case, DFG was required to prove that the "primary significance" of the design or appearance of DFG's tree stand and box was to help consumers identify the source of the product. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211 (2000). The third requirement is that the evidence must establish a likelihood of confusion as to source in the minds of purchasers, between the accused product and the alleged trade dress design.

In this case, DFG's stand was admittedly designed for purely functional purposes, namely, to be sturdy, stable and easy to use. AP04113-14, AP04147, AP04228-35, AP04266, AP04287-89, AP06422. In granting summary judgment that respondents' stand, which had been revised to avoid DFG's design patent, did not infringe that patent, the district court explicitly held: "not only that the patented design's individual features are functional, but also that the specific arrangement of those features, creating the stand's overall appearance, was guided by functional rather than ornamental considerations." Pet. App. 62a (emphasis added). DFG did not appeal that ruling. As to the display box, DFG admitted it designed the open box for functional reasons, namely, to display and feature the stand, believing the stand would sell better if consumers could see, touch and feel it. AP04295-303.

Similarly, because the stand used a large metal pipe that was cut to size, there was evidence that it was functionally desirable to place a plastic rim or cover around the top edge of the pipe to cover any burs or jagged edges and thus protect against cut hands in use.[1] Because the stand was a Christmas product, DFG chose the functional colors of that season, red and green, for the stand, the protective rim and decorations on the box. *See Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 874 (8th Cir. 1994) (use of red and green on packaging during the Christmas season is "clearly not protectable because such colors are traditionally used for products relating to Christmas and are therefore neither

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[1] When answering the question "Why is that red plastic ring there?" (referring to a competitive stand), one competitor testified in front of the jury: "When you cut a tube, it leaves a burr, which is a sort of sharp edge on the metal, and on a consumer product like that, you have the option of either drilling or grinding off the burr so it's not sharp or covering it somehow, and covering it seemed to be the easiest way to do it." AP05025 (Reporter's Transcript – Jury Trial Volume 7, May 14, 2003).

distinctive nor nonfunctional."). [2] In the district court, DFG specifically argued that it was not claiming exclusive rights to use the particular shade of green it had chosen.[3]

The court of appeals concluded that on the record in this case there was insufficient evidence to support a finding that DFG's stand design and packaging had acquired secondary meaning. Pet. App. 13a. In reaching that conclusion the Federal Circuit analyzed the six factors identified by the Ninth Circuit precedent that controlled in this case: (1) purchaser perception; (2) degree and manner of advertising; (3) demonstrated utility of trade dress in increasing sales product; (4) length of time and exclusivity of use; (5) intentional copying of defendants; and (6) evidence of actual confusion. Pet. App. 9a.

The court of appeals agreed with the district court that DFG failed to establish the first three factors. Pet. App. 9a. It sustained the district court's conclusion that DFG established the fourth factor—noting, however, that it was a

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[2] DFG's CEO, Mr. Boucher, testified in front of the jury "We wanted a dark green that resembled a Christmas color that was appealing to our eye...." AP04141 (Reporter's Transcript – Jury Trial Volume 2, May 7, 2003). A competitor testified that he was "told green is the preferred color" of a Christmas tree stand. AP05024 (Reporter's Transcript – Jury Trial Volume 7, May 14, 2003). Mr. Boucher also testified that he chose the colors for the packaging (white box with print colors of dark green and red) to make the DFG stand "really stand out. They complimented the stand." AP04151 (Reporter's Transcript – Jury Trial Volume 2, May 7, 2003).

[3] During closing argument to the jury, counsel for DFG stated: "So they [DFG] made theirs stand out. They picked a custom color. We heard from Mr. Bruckner of Tiger Drylac they had the biggest range of stock colors in the world, and they have to match this one. There is one company, and it's a big company, obviously, O'Brien, which was bought out by Dupont, and they have that as a stock color. But that really doesn't matter. We're not claiming that shade of green." AP05232 (Reporter's Transcript – Jury Trial Volume 8, May 16, 2003) (emphasis added).

close question. Pet. App. 10a. With respect to the fifth factor, intentional copying, the court of appeals made the following statements that are not challenged by DFG: "[I]t is the copying of non-functional elements of a product's design that can yield an inference of secondary meaning. Copying functional elements of a competitor's design is not a violation of the Lanham Act. *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 844-45 (9th Cir. 1987)." Pet. App. 11a (emphasis added). The court of appeals then observed that "the copied elements of DFG's tree stand that were identified as being non-functional by the district court (i.e. the colors, the plastic rim, and the display box) were, in fact, utilitarian in nature." Pet. App. 11a.[4] That conclusion was amply supported by the evidence, including admissions of DFG, noted above.

As to the sixth factor (confusion), there was admittedly no evidence of actual consumer confusion.[5] Instead, DFG relied on self-serving testimony of one of its own employees and an associate, and some questionable, non-probative evidence of statements allegedly made by three Home Depot employees. The court of appeals correctly rejected that evidence, holding that it

> only shows that a few Home Depot and DFG employees and associates may have been confused as to the origins of the tree stands at issue in this case. That evidence is not

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[4] At oral argument, DFG's counsel was asked by the panel "Where is the evidence in the record that consumers were confused?" and "Where's the affirmative evidence to support the non-functionality . . . of various features?" DFG's counsel failed twice to identify any such evidence, prompting the presiding judge's comment: "But twice you haven't answered Judge Prost's question as to evidence to sustain the jury verdict of non-functionality and confusing similarity." (See tape of oral argument.)

[5] *See* note 4, *supra*.

> substantial evidence of actual customer confusion.

Pet. App. 12a-13a. Moreover, a visual comparison of DFG's stand and the accused Home Depot 2001 stand forcefully demonstrates the significant differences in the design and color placement on the two stands and boxes, including the distinctive curlicue legs on the Home Depot stand. App., *infra*, 1a. The earlier 2000 Home Depot stand likewise included curlicue legs. App., *infra*, 1a. And the 1999 stand had distinctive angled struts between the legs and the stand and a different placement of the legs. Pet. App. 80a.[6]

On balance, the court concluded that the record here could not support a finding of secondary meaning. The court accordingly reversed the judgment of trade dress infringement.

ARGUMENT

The Federal Circuit's unanimous, unpublished decision holds only that, on the specific facts of this case, DFG failed to carry its burden of proving secondary meaning under settled Ninth Circuit law. In light of that failure, the other questions presented by the petition never arise. Nothing in the decision below implicates any division among the lower courts that requires review. In any event, both the record and common sense plainly support the court of appeals' conclusion.

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[6] The judgment and injunction reversed by the Federal Circuit applied even to Home Depot's 2001 stand, unless Home Depot took further steps to distinguish it from the already dissimilar DFG product. *See* Pet. App. 43a-44a.